It is submitted that a case of injustice such as that above illustrated, and which is made possible under the principles accepted by Mr. McDowell, by Mr. Minor, and by the court in the *Rich Patch Iron Co. Case*, can never arise under the view which, to the writer, seems the correct one, and which is embraced in the following propositions.

1. The statute is to be limited strictly to a *denial of a constructive possession of the whole where there is an actual adverse possession*, and furnishes no ground for an inference as to what the law may be in a case where there is *no actual adverse possession.*

2. Under the statute, as at common law, the constructive possession of a senior, fortified by his seisin in law, or "right to the immediate possession," shall always prevail against the mere constructive possession of a junior.

3. If there is no actual possession of any part of the land in dispute, the seisin in law of the senior shall prevail.

4. A constructive possession founded upon actual possession of part of the land in dispute, shall prevail against a mere seisin in law.

Of course, it is understood that the terms "actual possession," "constructive possession," and "seisin in law," are used in contemplation of the distinction between them made by Mr. McDowell in his initial article (3 Va. Law Reg. 765–6).

It will be seen that, under this view, the fullest effect may be given to the language of the statute; and all the cases, with the exception of *Stull* v. *Rich Patch Iron Co.*, may be reconciled. It is believed, though submitted with great trepidation, that the principles here enunciated are sufficient for the solution of every possible question of adversary possession.

It seems clear that the law is correctly stated in Judge Sims' paraphrase of the statute. The only objection to the paraphrase seems to be that it places an unnecessary limitation upon the terms of the statute. His corollary, of course, has no better right to existence than Mr. McDowell's.

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THE NEGOTIABLE INSTRUMENTS LAW.

This is an excellent piece of legislation. It not only tends to uniformity on this most important branch of the law, but, containing the main features of the law of negotiable paper in a single act, it is more

likely to be read than a text-book on the subject, and those dealing in that class of paper will more intelligently inform themselves on the subject. The title of the act is very comprehensive, and seems to indicate that the legislature intended to cover the whole subject by the single act, and thus by implication to repeal all other acts on the same subject. The title of the act is "An act to revise, arrange and consolidate into one act the laws relating to negotiable instruments (being an act to establish a law uniform with the laws of other States on that subject)." This view is further confirmed by sec. 196 of the act, which declares that any case not provided for in the act shall be governed by the rules of the law merchant. In *Fox* v. *Commonwealth*, 16 Gratt. 1, it was held that "where it is manifest that a law is intended to embrace and include the whole legislation on the subject to which it refers, provisions of former laws on that subject not embraced in it are repealed by implication." If this be the correct interpretation, then all other statute law in Virginia on the subject of negotiable instruments is repealed by implication. The last section of the act, however, declares that "All acts or parts of acts in conflict herewith are *to that extent* repealed." This would seem to indicate that the legislature did not intend to repeal existing statutes not in conflict with the act. It is more than probable that questions will arise which are not settled by the act, and concerning which there is a difference between the general law merchant and existing statutes. Of course it cannot be foretold what view the Court of Appeals will take of such questions, but in view of the language used in the last section of the act we think it probable that the court will hold that existing laws are repealed only so far as in conflict with the act, and that the laws not in conflict with this act are still in force.

We suppose that at least ninety-five *per cent.* of the new act is merely declaratory of the existing law, but the remaining five *per cent.* contains some very important changes. Without attempting to make an exhaustive statement of the changes, we enumerate some of the more important:

1. Under the new act it is not necessary that paper should be payable at a bank or banker's in this State, but all paper containing words of negotiability, including bonds, are declared to be negotiable.

2. Days of grace have been abolished.

3. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments pay-

able on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday, when that entire day is not a holiday. When paper falls due on Saturday or other legal holiday it is to be presented for payment on the next succeeding business day. This was the law before the passage of the present act.

4. It has for a long time been a much mooted question whether a banker was authorized to pay paper which was made payable at his bank, without other direction. The new act declares that "where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

5. The courts have also spent much time and learning in determining what was the liability of one who endorsed an instrument to which he was not otherwise a party, some treating him as a joint maker, others as guarantor, and others as endorser. *Frank* v. *Lilienfeld*, 33 Gratt. 377. Section 64 of the act declares what the liability of such a party is.

6. There were also conflicting decisions as to whether a check operated as an assignment or not. Section 189 of the act declares that a check does not of itself operate as an assignment of any part of the funds to the credit of the drawer, and that the bank is not liable to the holder unless and until it accepts or certifies the check.

7. In *Woodward* v. *Foster*, 18 Gratt. 200, it was held that in an action by an endorsee against his immediate endorser upon a protested bill, parol evidence of an agreement between them at the time of the endorsement which would vary the legal liability of the endorser under his endorsement was inadmissible. Similar decisions were made in *Brown* v. *Spofford*, 95 U. S. 474, and in *Burke* v. *Dulaney*, 153 U. S. 228. Section 68 of the new act declares that, as respects one another, endorsers are liable *prima facie* in the order in which they endorse, but evidence is admissible to show that as amongst themselves they have agreed otherwise. We suppose, of course, it means that *parol evidence* is admissible, for there was never any doubt that if the contracts of parties were reduced to writing at the time, although they consisted of several papers, all were admissible in evidence to show the contract. Section 68, therefore, would seem to be intended to change the law as announced in *Woodward* v. *Foster*, *supra*.

8. In many jurisdictions the law was not settled as to how notice should be given so as to bind an endorser who was dead at the time of

protest, but upon whose estate no administration had been granted. It had been held in Virginia in *Boyd* v. *City Savings Bank*, 15 Gratt. 501, that a notice addressed to "the legal representative" of the endorser at the proper postoffice was sufficient. Section 98 of the new act declares that if there be no personal representative of the deceased endorser notice may be sent to the last residence, or to the last place of business, of the deceased.

9. Section 153 of the new act declares what a protest must specify, but wholly omits anything on the subject of notice. In other words the protest is not required to state how or when the notice was given. It is a matter of the greatest practical importance to determine what evidence must be introduced to fix the liability of the endorsers. Section 2850 of the Code declares that the protest shall be *prima facie* evidence of what is stated therein, or at the foot, or on the back, thereof, in relation to presentment, demand, dishonor and *notice thereof. If this section of the Code is still in force,* notwithstanding the provisions of the new act, then the certificate of protest will in the future as in the past furnish the evidence of notice. In *Corbin* v. *Bank*, 87 Va. 661, it was held that what was stated in the certificate of protest of a note which was protested outside of the State was not evidence thereof, because such a protest was not governed by the language of sec. 2850 of the Code. In order to meet this trouble the legislature amended section 2850 by an act approved February 27, 1894, by which it declared that the protest in all cases, whether such protest be made in this State or not, shall be *prima facie* evidence of what is stated therein, or at the foot, or on the back, thereof, in relation to presentment, demand, dishonor and notice thereof. This act was passed for the very purpose of changing the law as announced in *Corbin* v. *Bank, supra.* In that case Judge Lewis, delivering the opinion, says: "By the law merchant, which is a part of the common law, protest of a dishonored foreign bill of exchange is ordinarily indispensable, and the notary's certificate of protest proves itself, that is, it is *prima facie* evidence of presentment, and non-acceptance or non-payment. But the rule does not extend to promissory notes and inland bills. *As to these, the protest is not regarded as an official act, and accordingly, in the absence of statute, is not receivable as evidence of dishonor.*" (Italics ours.) It will be observed, therefore, that if the method of proving notice is not one of the cases provided for by the act, and is to be governed by the general law merchant, then the notice must be proved otherwise than by the certificate of protest, but

if sec. 2850 of the Code is still in effect, the notice may be proved by the certificate of protest.

10. The new act, in accordance with the law as it already existed in this State, in effect declares that inland bills and notes may, but need not, be protested.

11. Section 120 of the new act declares that a person secondarily liable on an instrument is discharged by the discharge of a prior party. A prior party would be discharged by failure to give due notice of dishonor, and if this language of the act were construed literally, it would always be incumbent on the holder to give notice not only to those whom he desired to hold, but to all parties who would be liable to those whom he desired to hold. But such we think is not the proper construction of that section. We believe that the holder is still only required to give notice to those whom he seeks to hold liable. The original bill introduced in the legislature is extensively annotated. Opposite this paragraph of section 120 is a reference to section 1307 of Daniel on Negotiable Instruments. On reference to that book it will be found that the text states the law in the language of the act. The author cites two New York cases in support of the proposition, and adds, in the note: "But it is not necessary to notify a prior endorser in order to hold a subsequent one." We suppose, of course, that the interpretation put upon the language used will be held to be a part of the law.

12. No time is fixed for the act to go into effect, and hence, in accordance with section 4 of the Code, the act goes into effect July 1, 1898. Section 195 of the act declares that the provisions of this act do not apply to negotiable instruments made and delivered prior to the passage thereof. The act was approved March 3, 1898. Many instruments were made and delivered after the passage of the act which matured before it went into operation. Of course, the act could have no effect upon these. But as to instruments made after March 3, 1898, and which mature after the 1st of July, 1898, it would seem that the act applies. This section is a literal copy of section 6 of the New York act. In a note to that section, Mr. John J. Crawford, of the New York bar, who was the author of the original law, gives it as his opinion that the act does apply to all paper made after the passage of the act but maturing after it went into effect. In New York the act went into effect October 1, 1897. Mr. Crawford says:

"The time when the statute is to take effect is provided for by sec. 341. In New York this is October 1, 1897. But while the law will

not go into effect until then, its application is not limited to instruments made after that date. An instrument made and delivered after the passage of the act will be equally within its operation after October 1st. For example, if a note payable four months after date be dated and delivered on July 15, 1897, it must, at maturity, be presented for payment in the manner prescribed by the statute; and if dishonored, the statutory rules as to giving notice of dishonor must be complied with." Crawford's Annotated Negotiable Instruments Law, p. 7.

We have been informed that a different construction has been put upon this act by many of the bankers in the State, and that they do not expect to apply the new law to any paper except to that made and delivered after July 1, 1898. We should regard this as extremely hazardous. While we are not wedded to any particular view of the matter, the construction placed upon section 195 by the original draughtsman of the act seems to be in every way a reasonable construction of the language used, and it would be safer to make presentment and demand and give notice at the time prescribed by the act. As no protest is required of inland bills and notes, the bankers may save themselves in a large majority of instances by not protesting the paper, but simply giving notice to the parties bound on it that it was presented for payment, and payment demanded and refused at the time fixed by the act. This notice would be as effectual to bind endorsers as a protest, and at the same time would obviate any injury to credit by protesting paper before it was due, if the provisions of the act do not apply.

The construction suggested by the bankers completely nullifies section 195 of the act, which would seem of itself to condemn that view. Every section of the act must be construed to mean something, if possible. Our view does give meaning and effect to that section. The legislature, in effect, gave four months warning that on and after July 1, 1898, no time-paper made after March 3, 1898, should be entitled to days of grace. Practically this would cover all bankable paper maturing after July 1. Comparatively little paper is discounted at bank which has more than four months to run, and we presume that the legislature meant to relieve the bankers of the necessity of inspecting each piece of paper to determine whether it was entitled to grace or not, and to declare a simple rule, to-wit, that none was entitled to days of grace after July 1, unless dated prior to March 3. The number of pieces of this class held by any one bank would be very few.

These could be readily marked at one time, and the banker thereafter know there were no more days of grace at his bank.

There are other provisions of this bill to which we would like to call attention, but this article is already too long. Some member of the bar could do the profession and the general public a substantial service if he would take this act, section by section, and annotate it with the Virginia decisions, as the New York statute is annotated with the decisions of New York and other States. As stated in the outset, most of the provisions of the act are simply declaratory of the existing law, but it would be very useful if some one would point out the different cases decided in Virginia announcing the principles which have now become statutory.

Prof. Huffcut's new work on this subject, reviewed in the last issue of the REGISTER (p. 130), will be extremely useful for reference in this connection.

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